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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARTELL CHARROD WILLIAMS,

Defendant and Appellant.

G040634

(Super. Ct. No. RIF127041)

O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, Paul E. Zellerbach, Judge. Affirmed in part, reversed in part and remanded.

William R. Salisbury, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-Ladendorf and Christine Levingston Bergman, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant claims several errors. He contends the trial court erred in admitting evidence of an uncharged prior crime. He argues a lack of sufficiency of evidence to prove the instant crimes were committed for the benefit of a criminal street gang. He says he was improperly sentenced. We affirm in part, reverse in part and remand.

I

FACTS

A jury returned guilty verdicts of first degree burglary, robbery, possession of marijuana for sale and transportation of marijuana against defendant Martel Charrod Williams. True findings that he personally used a firearm and acted for the benefit of a criminal street gang in commission of all four crimes were also returned, as well as a true finding that defendant acted in concert with two or more persons when he committed the robbery. He was also found guilty of being a felon in possession of a firearm for the benefit of a criminal street gang and guilty of the crime of being an active participant in a criminal street gang. He was found not guilty of the crime of witness intimidation. The court sentenced defendant to 47 years to life in prison.

Joseph Drake testified under a grant of transactional immunity. Drake lived with four roommates. On October 5, 2005, the police searched the house and the police found a “substantial amount” of marijuana stored there. After the police searched the house, the front door was “always jammed up.” The only way into the house was through the garage.

Drake told the police he “took responsibility for the marijuana.” Drake said he sold marijuana, “making like 15 grand a month.” He also “loaned a lot of people money.” A day or two before this incident, he went to a video shoot; he saw defendant there.

On November 11, 2005, at about 10:00 o’clock in the evening, Drake was walking down the stairs when he saw defendant and two other African-American men

wearing hooded sweatshirts. When Drake saw them, he walked back up the stairs to his room. He said he didn't think anything of it because the place was "a big party house, a flop spot."

Defendant and the other two men came into his bedroom, and "hell broke loose." At least two but possibly all three men had guns. Defendant was one of the ones who pulled out a gun. There was a "lot of yelling" and commotion. The men yelled "get on the ground" and "where is the money?" Drake was hit on the head with a gun. He said he was "pistol-whipped in the ear" and lost consciousness for "a little bit." Drake was not clear on which of the three was doing what. He said, "I am kind of down on the ground, you know what I mean? I am peeking through just seeing from waist down"

Drake explained what happened. He said one of them "kept asking me for the money. I gave him two bogus spots that was behind the dresser. So one of them apparently ran over to the dressers, flopped them both on the ground. It wasn't there. He got mad. [¶] So then one of them hit me with the gun. I went unconscious for a second. When I woke up, I kind of got up a little bit from the blackout. [O]ne of them picked me up and walked me over to the attic, boosted me up into the attic. I handed them a suitcase full of money. And they ran out."

II

DISCUSSION

Prior robbery

Defendant argues the trial court erred when it permitted the prosecutor to introduce evidence of a prior robbery. He claims this amounted to prejudicial error.

Pretrial, the prosecutor informed the court he intended to prove the prior uncharged crime by calling an accomplice to the prior robbery. He said the prior crime was not charged because "the victim was a drug dealer, and he never made a report to the police." The defense argued: "this isn't to prove intent, but to show his conduct on a

specific occasion, and that is specifically prohibited under [Evidence Code section] 1101 [subdivision] (a).”

The court ruled the evidence was admissible, explaining: “The weighing and evaluation the court must undergo under [section] 352 is whether it’s so unduly prejudicial as to substantially outweigh its probative value and here it’s no more serious a case than the case we have here. [¶] As a matter of fact, one could argue that the case is more egregious [than the prior crime] because the victim was physically assaulted and pistol-whipped during the course of the robbery. [¶] So I think it does meet the requirement under section 1101, a probative value does outweigh any undue prejudice to Mr. Williams.”

Before the witness testified about the prior crime, the court told the jury: “And at this point, the People are going to be presenting evidence, folks, that relates to other offenses that are not charged in this case. And I am instructing you that you may consider this evidence only if the People have proved by a preponderance of the evidence — remember to prove a defendant guilty, it has to be beyond a reasonable doubt — but with respect to what we call other crimes evidence that the People are now presenting, they have to prove evidence by a preponderance of the evidence before you can rely upon it or use it in your deliberations. [¶] And so therefore, you may consider, again, this other crimes evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed these other uncharged offenses. Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. [¶] A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that it is true. If the People have not met this burden, then you must disregard this evidence entirely. [¶] If you decide that the defendant did commit these other uncharged offenses, you may, but are not required, to consider that evidence for the limited purpose of deciding whether or not the defendant acted with the intent to commit a theft in this case, or that the defendant had a motive to

commit the offenses alleged in this case. [¶] In evaluating this evidence, consider the similarity or lack of similarity between the uncharged offenses and the charged offenses in this case. [¶] Do not consider this evidence for any other purpose. Do not conclude from this evidence that the defendant Martel Williams has a bad character or is disposed to commit crime. [¶] If you conclude that the defendant committed these other uncharged offenses, that conclusion is only one factor to consider, along with all the other evidence presented in this trial. It is not sufficient by itself to prove that the defendant is guilty of the offenses charged in this case. The People must still prove each element of every charge in this case beyond a reasonable doubt.”

At trial, Corey Cecil testified he was serving a 56-month sentence in a federal prison in Lexington, Kentucky for possession of “five kilos of cocaine” with intent to distribute. As part of a plea agreement, Cecil promised “to cooperate with any sort of law enforcement investigation.” He confirmed that if he did “under the federal sentencing guidelines, the U.S. Attorney’s office in Nashville could bring [his] case with [his] lawyer back up for resentencing and [he could] be resentenced” if he did not cooperate with law enforcement.

Corey said he and defendant committed a burglary in Knoxville, Tennessee in May 2005. He said defendant telephoned him about “a situation that was going on in Knoxville.” Defendant flew from Los Angeles to Nashville, and Cecil picked defendant up at the airport. Two other people were there too. Corey explained how he learned about the planned crime: “Once we got there, [defendant] explained everything to me. It was the other two — one of the other two cats was a guy who was from L.A. that knew the guy in Knoxville, had been staying with him. The guy he had been staying with had been promising him a lot of stuff that he supposed to be doing, but never came through with it.” The prosecutor interrupted to ask if “this friend of [defendant] was helping sell drugs for somebody?” Corey responded, “Exactly.” He continued: “Like I said, one of the guys was promising this other guy certain amounts of drug, but he never did come

through with the drug. So the guy kind of got fed up with the situation of making promises but didn't come through. And he finally said, 'I am tired of these promises not coming through.' So he just said, 'I am going to have the guy robbed.'" One of them had a key, and the plan was "to clean out that guy's house," and the four were supposed "to wait for a perfect time until the house was empty to go in and do what we had to do." They waited "the whole weekend."

Corey said: "And the guy who knew everything that was supposed to take place, was saying — told us to, 'We will wait until Monday.' And his girlfriend would have to go to work — his wife would go to work and drop the baby off at the babysitter and go to school, whatever. And the guy who actually lived there, who we [were] going to rob, he would get out in the streets and start making his runs. Then that would be a perfect time for us to do what we have to do."

The following Monday, the drug dealer's girlfriend left the house and 45 minutes later, the drug dealer left. The four followed the drug dealer for about 10 minutes, and then turned around "back towards the house." They pulled into the driveway and "one of the guys got out and clipped his alarm system." But the alarm sounded anyway. Cecil "snatched the safe" and "boom, we go out the front door into the trunk."

Later they rented a concrete saw at Home Depot, and sawed off the back of the safe. There was money inside, "a lot of it," in \$5,000 stacks. The total was "300,000 and some change." Defendant shipped his \$75,000 home by "UPS, Federal Express, DHL, some type of way."

Evidence Code section 1101 precludes the admission of evidence of uncharged crimes when offered to show nothing more than bad character or a propensity for criminality. But that section further provides, "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan,

knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act.” (Evid. Code, § 1101, subd. (b); *People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) “Admission of Evidence Code section 1101, subdivision (b) evidence is addressed to the sound discretion of the trial court. The trial court may exclude or admit this type of evidence pursuant to Evidence Code section 352 which provides: ‘The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.’ The trial court’s determination will not be disturbed on appeal absent a clear showing of an abuse of discretion. [Citations.]” (*People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1609-1610.)

The trial court did not abuse its discretion in determining the probative value of this evidence outweighed any potential prejudice from its admission. “There was no danger of undue consumption of time or of confusion of the issues. The evidence was not of a sort likely to provoke emotional bias against a party or to cause the jury to prejudge the issues upon the basis of extraneous factors. [Citations.]” (*People v. Jenkins* (2000) 22 Cal.4th 900, 1008.) In fact, as the trial court noted, the uncharged crime did not involve the violence the charged crime did. The facts of the prior act were similar: defendant went to the home of a drug dealer who kept a large amount of money in the house for the purpose of stealing the money. The prior act was probative to show intent in the instant crime. The court did not err.

Gang enhancements

Defendant next contends a lack of sufficiency of the evidence to support the criminal street gang enhancements. Although he does not dispute the sufficiency of the evidence that 97 East Coast Crips fits the criteria of a criminal street gang or that he is a

member of that gang, he argues the evidence did not prove he acted with the specific intent to promote, further or assist criminal conduct of the 97 East Coast Crips.

In addressing challenges to the sufficiency of evidence, “the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence — evidence that is reasonable, credible and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.] Although it is the jury’s duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant’s guilt beyond a reasonable doubt. [Citation.] “‘If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]’” [Citation.]” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.) The same standard of review applies to true findings on gang enhancement allegations. (*People v. Ortiz* (1997) 57 Cal.App.4th 480, 484.)

The gang enhancement statute under which defendant was convicted, Penal Code section 186.22, subdivision (b)(1)¹, provides that “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he

¹ All further statutory references are to the Penal Code.

or she has been convicted, be punished” by an additional term. To establish the enhancement, “the prosecution must prove that the crime for which the defendant was convicted had been ‘committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.’” (*People v. Gardeley* (1996) 14 Cal.4th 605, 616-617.)

“In 1988, the Legislature enacted the California Street Terrorism Enforcement and Prevention Act (the STEP Act). (§ 186.20 et seq.) ‘The impetus behind the STEP Act . . . was the Legislature’s recognition that “California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods. These activities, both individually and collectively, present a clear and present danger to the public order and safety and are not constitutionally protected.” (§ 186.21.)’ [Citation.]” (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047.)

The STEP Act prescribes increased punishment for a felony if it was related to a criminal street gang. (§ 186.22, subd. (b)(1).) “[T]o subject a defendant to the penal consequences of the STEP Act, the prosecution must prove that the crime for which the defendant was convicted had been ‘committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.’ [Citation.]” (*People v. Gardeley*, *supra*, 14 Cal.4th at pp. 616-617.) In order to prove the elements of a criminal street gang enhancement, the prosecution may present and rely on expert testimony on criminal street gangs. (*Id.* at pp. 617-620; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 322.)

Detective Ken Thurm of the Riverside County Sheriff’s Department works on the gang task force. Thurm explained why a Los Angeles based gang made its way to Riverside: “It’s very crowded in L.A. with the gang injunctions that the City of Los Angeles and County of Los Angeles doing as well as their gang enforcement, it’s very

hard for a L.A. based gang member who's been a gang member for a long time to continue to operate. All the police know who they are, you're battling violently with other surrounding gangs for territory, to conduct your businesses, be it narcotics, guns or prostitution. [¶] So when you can move to Riverside County, that's going to get rid of a lot of those problems. You're going to be basically anonymous to law enforcement because they've never seen you before. The gangs in Riverside County, you're not going to be battling with so violently initially. You're going to come from a L.A.-based gang, say, a history of violence, so there's automatically going to be a level of respect from the local home-grown gangs. You're going to step into an alley and already have a little more notoriety than somebody else from a local home-grown gang."

Regarding East Coast, Thurm said "the gang is still establishing itself. At least it was last year. And then more recruiting." Thurm interviewed Antonio Smith who admitted he was an East Coast member. Smith said he was 38 years old and had been an East Coast member since he was 13 or 14 years old. He said there were more than 1,300 East Coast members on 118th Street, divided into 13 sets of at least 100 members. Thurm asked Smith whether or not "East Coast [is] out here in Moreno Valley," and Smith said, "Yeah, there's East Coast everywhere. We nationwide." Smith said he talks with East Coast members every day.

The prosecutor posed a hypothetical question concerning a home invasion robbery similar to the instant case and asked the expert if he had an opinion whether or not such a robbery could be committed for the benefit of a gang. Thurm said: "[I]f you're not deep in a good solid gang, the person you're ripping off is going to come back for you. You have to expect that. And the only way to prevent any type of retaliation is by being a member of a well-known reputable gang so your victim would be [less] inclined to come after you."

Thurm also explained the importance of respect: "The best way to translate respect in the gang life is fear. They're afraid of what this person can do to them.

They're afraid of how miserable they can make your life. And through that fear, that's what's considered respect, the power that that man has over me.” He said members of the community get the word, and that witness intimidation is an important component.

In response to a question about whether it made any difference if two of the robbers were not East Coast gang members, Thurm said: “[W]hen you're moving out here into this area, it's nice because it's right — there's victims, easy victims, there's easy drug territory and all that. [¶] The challenge you're going to have a lot of times is you're moving out here by yourself and there's going to be very few of your own gang. So one, you either have to reach out to other gang communities that are in the area where they want to commit their crime, or there are people they trust or their friends. They're going to bring the experience and probably the plan, but they're going to need more members. So you're going to be more apt to reach out to whoever you can get, which might be people from opposing gangs, home-grown gangs, or people that are just your friends that you hang out with in the neighborhood.”

Another gang expert, Erik Shear, explained how community fear equals respect and intimidation for a gang. Shear noted that drugs mean money to gangs and that “drug rip-offs are very common.” He added that defendant committed this crime with another East Coast member, and that “makes me even more confident that this crime is committed for the benefit of East Coast Crips”

Here two experts explained why and how defendant's gang benefited from the instant crimes, and why and how defendant committed the instant crimes for the benefit of his gang. Two East Coast gang members were involved. The gang received increased respect from other gangs and decreased the likelihood of retaliation by having gang involvement. The gang also received increased respect by way of instilling fear and intimidation into the community. And the gang benefited from the profits of the crimes. In the record before us, we find substantial evidence the instant crimes were committed for the benefit of the East Coast Crips. We do not find error.

Sections 654/12021

Defendant next contends section 654 bars punishment for both being a felon in possession of a firearm and for use of the same firearm while committing the robbery. He argues his concurrent sentence should be stayed.

Section 654 requires that an act or omission that is made punishable in different ways by different provisions of the Penal Code may be punished under either of such provisions, “but in no case shall [it] be punished under more than one” This provision bars multiple punishment when a defendant is convicted of two or more offenses that are incident to one objective. (*Neal v. State of California* (1960) 55 Cal.2d 11; *People v. Latimer* (1993) 5 Cal.4th 1203 [reaffirming *Neal*].) “Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective of the actor*. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.” (*Neal v. State of California, supra*, 55 Cal.2d at p. 19, italics added.)

“In determining whether the facts call for the application of section 654, the threshold inquiry is to determine the defendant’s objective and intent. [Citation.] The California Supreme Court . . . observed that “. . . if all the offenses are incident to one objective, the defendant may be punished for any one of them but not for more than one.” [Citation.]’ [Citation.] Further, the question whether the defendant held multiple criminal objectives is one of fact for the trial court, and its finding will be upheld on appeal if there is any substantial evidence to support it. [Citation.] For example, separate punishments for convictions of assault with a deadly weapon, a machine gun, [citations] and possession of a machine gun [citation] would not violate section 654, where there was ‘substantial evidence of possession antecedent to the assault. [Citation.]’ [Citation.]” (*People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1408.)

“[W]e distill the principle that if the evidence demonstrates at most that fortuitous circumstances put the firearm in the defendant’s hand only at the instant of committing another offense, section 654 will bar a separate punishment for the possession of the weapon by an ex-felon.” (*People v. Ratcliff, supra*, 223 Cal.App.3d at p. 1412.)

“Whether a violation of section 12021, forbidding persons convicted of felonies from possessing firearms concealable upon the person, constitutes a divisible transaction from the offense in which he employs the weapon depends upon the facts and evidence of each individual case. [Citation.] Thus where the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved. [Citations.]” (*People v. Venegas* (1970) 10 Cal.App.3d 814, 821.) “Here the evidence shows a possession only at the time defendant shot Rodriguez. Not only was the possession physically simultaneous, but the possession was incidental to only one objective, namely to shoot Rodriguez. Imposition of sentence upon both counts I and II, therefore, constituted multiple punishment proscribed by section 654.” (*Ibid.*)

In the instant case, the evidence shows possession distinctly antecedent and separate from the primary offense. There is no evidence defendant used a weapon he took from the victims or from anyone else. Drake testified defendant “pulled out a gun.” A reasonable inference to be drawn is that defendant had the gun concealed on his person prior to entering the house and pulling it out. Thus the court properly imposed punishment for the firearm possession count.

Sections 654/11359

Lastly defendant contends his sentence for possession of marijuana for sale should also be stayed under section 654. He argues that if he committed a robbery to obtain narcotics for sale, he may be punished for the robbery, but not for taking narcotics

because the two crimes comprise an indivisible course of conduct. The Attorney General concedes this argument. We agree that defendant's point is well taken. (*People v. Austin* (1994) 23 Cal.App.4th 1596, 1613-1614.)

III

DISPOSITION

The judgment is affirmed in part, reversed in part and remanded to the superior court for resentencing. (See *People v. Burns* (1984) 158 Cal.App.3d 1178, 1183.)

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.